SUBJECT INDEX

PAGE

Statement of case 5

Denial of the interlocutory injunction was the only order appropriate and justified upon showing made by appellant 9

What is an abuse of discretion? 19

The optometry practice act should be sustained as a valid measure 23

The terms of the optometry act are not unconstitutional and their validity is amply supported by precedent 30

The exemption of physicians and surgeons 36

INDEX OF CASES CITED

PAGE

American Grain S. Co. vs. *Twin City S. Co.*, 202 Fed. 202 17

Arbuckle vs. *Blackburn*, 112 Fed. 616 14

Atkins vs. *Chilson*, 7 Metc. (Mass.) 398 10

Barmore vs. *State Board Medical Examiners*, 21 Or. 301; 28 Pac. 8 28

Bosley vs. *McLaughlin*, 236 U. S. 385 ..... 14, 42

Branch Turnpike Co. vs. *Board of Supervisors*, 13 Cal. 190 9

Brown vs. *Mayor, etc., Birmingham*, 140 Ala. 590 ..... 14, 15

Burroughs vs. *Webster*, 150 Ind. 607 36

Campbell vs. *Seaman*, 63 N. Y. 568 9

C. Gee Wo vs. *State*, 36 Neb. 241; 54 N. W. 513 28

Collins vs. *Texas*, 223 U. S. 288 ..... 16, 27, 32

Commercial Bank vs. *State*, 4 S. & M. (Miss.) 439 22

Coopey vs. *Keady*, 139 Pac. (Or.) 108 16

Craig vs. *Board of Medical Examiners*, 12 Mont. 203; 29 Pac. 532 28

Crighton vs. *Dahmer*, 70 Miss. 602 14

Davis and Farnum Mfg. Co. vs. *City of Los Angeles*, 189 U. S. 207 ..... 14, 15

Davis and Farnum Mfg. Co. vs. *City of Los Angeles*, 115 Fed. 537 ..... 14, 15

DeLacy vs. *Adams*, 52 N. Y. St. Rep. 509 20

Dent vs. *West Virginia*, 129 U. S. 114 ..... 16, 23, 27, 34

Denver vs. *Beede*, 25 Colo. 172; 54 Pac. 624 ..... 14, 15

Dobbins vs. *Los Angeles*, 195 U. S. 223 15

Dogge vs. *State*, 17 Neb. 140; 22 N. W. 348 28

Driscoll vs. *Commonwealth*, 93 Ky. 393; 20 S. W. 431 28

INDEX TO CASES CITED—Continued

PAGE

Eastman vs. *State*, 109 Ind. 278 ---- 27

Ex parte Frazer, 54 Cal. 94 ---- 27

Ex parte Gerino, 143 Cal. 412 ---- 27

Ex parte McManus, 151 Cal. 331 ---- 27

Ex parte Spinney, 10 Nev. 323 ---- 28

Ex parte Whitley, 114 Cal. 167 ---- 27, 35

Finger vs. *Kingston*, 29 N. Y. St. Rep. 702 ---- 22

Fireball G. T. & I. Co. vs. *Commercial Acetyline Co.* (C. C. A.) 198 Fed. 650, 653 ---- 17

Fitts vs. *McGhee*, 172 U. S. 516 ---- 14

Fox vs. *Territory*, 2 Wash. T. 297 ---- 29

France vs. *State*, 57 Ohio St. 1; 47 N. E. 1041 ---- 28

Geurkink vs. *Petaluma*, 112 Cal. 306 ---- 9

Harding vs. *People*, 10 Colo. 387; 15 Pac. 727 ---- 27

Harriman vs. *Northern Securities Co.*, 132 Fed. 464 ---- 22

Hawker vs. *New York*, 170 U. S. 189 ---- 16, 27, 29

Hewitt vs. *Board*, 148 Cal. 590 ---- 27

Hewitt vs. *Charier*, 16 Pick. 363 ---- 28

Higginson vs. *C. B. & Q. R. R.*, 102 Fed. 197, 199; 42 C. C. A. 254, 256 ---- 18

High on Injunctions (4th Ed.), Sec. 1696 ---- 18

In re Chung (N. M.), 49 Pac. 952 ---- 28

In re Sawyer, 124 U. S. 200 ---- 14

In re Smith, 10 Wend. (N. Y.) 449 ---- 28

Interurban Ry., etc., vs. *Westinghouse E. & M. Co.*, 186 Fed. 166, 170; 108 C. C. A. 298, 302 ---- 18

Iowa Electric Medical College vs. *Schrader*, 87 Ia. 659; 55 N. W. 24 ---- 28

Jacob vs. *Day*, 111 Cal. 571; 44 Pac. 243 ---- 10

Johnson vs. *Baltimore, etc., R. Co.*, 4 App. Cas. (D. C.) 491 ---- 9

Joyce Injunctions, 1, Sec. 58–60*a* ---- 14

Judicial Code of United States, Sec. 266 ---- 6

Judicial Code of United States, Sec. 267 ---- 11

Kirwin vs. *Murphy*, 189 U. S. 35 ---- 9

Kettles vs. *People*, 221 Ill. 221 ---- 29, 41

Logan & Bryan vs. *Postal Telegraph Co.*, 157 Fed. 570 ---- 14

Logan vs. *State*, 5 Tex. App. 306 ---- 28

L. & N. R. R. Co. vs. *United States*, 238 U. S. 1, 9 ---- 18, 19

INDEX TO CASES CITED—Continued

PAGE

Love vs. *A. T. & S. F. Ry. Co.*, 185 Fed. 321, 330; 107 C. C. A. 403 17

Magruder vs. *Belle Fourche Valley Water Users Assn.*, 133 U. S. (C. C. A.) Rep. 524, 534 17

Martin vs. *Baldy*, 249 Pa. St. 253 23

Martin vs. *Murphy*, 216 Mass. 466 16

Massie vs. *Burck*, 128 Fed. 27, 31; 62 C. C. A. 535, 539 17

Mechanics Foundry vs. *Ryall*, 75 Cal. 601 10

Meyers vs. *Ives*, 28 Colo. 461 9

Newby vs. *Highway Commissioners*, 21 Ill. App. 245 10

Optometry Act, California, Sec. 10 36

Optometry Act, California, Sec. 2 23

People vs. *Blue Mountain Joe*, 129 Ill. 370; 21 N. E. 923 28

People vs. *Fulda*, 52 Hun, 65; 4 N. Y. Supp. 945 28

People vs. *Griswold*, 213 N. Y. 92 29

People vs. *Hasbrouck*, 11 Utah, 291 28

People vs. *Hornef*, 154 Cal. 355 27

People vs. *Jordan*, Cal. Supreme Ct. March 24, 1916 ..... 27, 40

People vs. *New York Canal Board*, 55 N. Y. 390 10

People vs. *Phippin*, 70 Mich. 6; 37 N. W. 888 28

People vs. *Ratledge*, Cal. Supreme Ct. March 24, 1916 27

Rast vs. *Van Deman and Lewis*, 240 U. S. 342, 357 43

Reetz vs. *Michigan*, 188 U. S. 505 ..... 27, 35

Rend vs. *Venture Oil Co.*, 48 Fed. 248 22

Ritter vs. *Patch*, 12 Cal. 298 9

South, etc., R. Co. vs. *R. R. Commissioners*, 210 Fed. 465 16

State vs. *Call*, 121 N. C. 643; 28 S. E. 517 28

State vs. *Carey*, 4 Wash. 424; 30 Pac. 729 29

State vs. *Dent*, 25 W. Va. 1 27

State vs. *District Court*, 13 Mont. 370 28

State vs. *Fleischer*, 41 Minn. 69; 42 N. W. 696 28

State vs. *McIntosh*, 205 Mo. 616, 636 16

State vs. *Mosher*, 78 Ia. 321; 43 N. W. 202 28

State vs. *Randolph*, 23 Or. 74; 31 Pac. 201 28

State vs. *State Board of Medical Examiners*, 34 Minn. 387; 26 N. W. 125 28

State vs. *State Medical Examiners Board*, 32 Minn. 324; 20 N. W. 238 28

State vs. *Van Doran*, 109 N. C. 864 28

INDEX OF CASES CITED—Continued

PAGE

State vs. *Wood*, 155 Mo. 425 9

State vs. *Yegg*, 19 S. D. 234 27

Sullivan vs. *San Francisco Gas & Electric Co.*, 148 Cal. 368 15

Thompsonville Scale Mfg. Co. vs. *Osgood*, 26 Conn. 16 20

Tipton vs. *State*, 74 Tex. Crim. Rep. 225; 168 S. W. 97 27

Truax vs. *Raich*, 239 U. S. 33 10

Wallack vs. *Society*, 67 N. Y. 23 14

Watson vs. *Maryland*, 218 U. S. 173, 179 ..... 16, 27, 34

Western Union Telegraph Co. vs. *Norman*, 77 Fed. 13 9

Willcox vs. *Trenton Potteries Co.*, 64 N. J. Eq. 173 10

Williams vs. *People*, 121 Ill. 84; 11 N. E. 881 28

No. 25315

IN THE

Supreme Court of the United States

October Term, 1916.

No. 1032.

KATE P. McNAUGHTON,

Appellant,

vs.

HIRAM W. JOHNSON, Governor of the State of California, U. S. WEBB, Attorney General of the State of California, and THOMAS LEE WOOLWINE, District Attorney of the County of Los Angeles, State of California,

Appellees.

BRIEF ON BEHALF OF APPELLEES.

STATEMENT OF THE CASE.

This proceeding is an appeal from an order refusing an interlocutory injunction, the appellant seeking to secure an intermediate restraining order, enjoin-

ing the appellees, as officers of the state of California, from enforcing the provisions of a law in that state known as the Optometry Practice Act.

The appellant filed her bill in equity in the District Court of the United States for the Southern District of California, Southern Division, asking a decree of that court, adjudging such law, heretofore referred to, to be unconstitutional, and granting an interlocutory injunction, restraining the enforcement of the law, and praying that, at the termination of the suit, a permanent injunction be granted to restrain the enforcement of the law as against the appellant.

The application for the interlocutory injunction was made in the usual manner under the terms of section 266 of the Judicial Code of the United States, and was heard by the Honorable Erskine M. Ross, Circuit Judge of the United States, and the Honorable Oscar A. Trippet and the Honorable E. E. Cushman, district judges, and these judges, after listening to argument, denied the interlocutory injunction, and, at the same time, handed down a memorandum of opinion, in which it was indicated that, in their judgment, the question was addressed to the sound discretion of the court. It was also stated that it was the understanding that these judges were not called upon to decide the merits of the suit. (See transcript, page 20.)

It is the opinion of the writer of this brief that the paramount question to be reviewed in this appeal is whether the judges, in denying the interlocutory injunction, abused their discretion. The merits of

the suit, if we confine argument to its strict limitations, can hardly be reviewed by this court under this appeal, but inasmuch as the subject matter is a broad one, and, in the ultimate analysis, the facts charged in the bill of complaint blend themselves into a question of law, we desire to urge the merits of the entire controversy, and, with this end in view, will give our best attention to the broad question touching the constitutionality of the law attacked by appellant.

The text of the law which is questioned is fully set forth in the bill of complaint (see transcript, pages 4, 5, 6, 7, 8 and 9). In substance, it was intended by its terms to regulate the practice of what is known as the profession of optometry in the state of California, the profession of optometry being the practice by mechanical means of correcting refractive errors of the human eye by the adaptation of lenses thereto instead of by medical or surgical means. While the work of the oculist or physician is the application of a remedy based upon a diagnosis, the work of the optometrist is purely mechanical, and his conclusions are determined mathematically.

We desire to accord the subject of this brief the fullest treatment, and, in order to proceed in an orderly manner, we will separate our theme into two obvious divisions. First, we have to consider the discretion of the three judges whose order denied to appellant her application for an interlocutory injunction, and we assert that, should this court decide adversely to appellant on this single phase, all other questions in dispute are thereby disposed of. Second,

we intend to treat of the law which appellant urges be nullified by the decree of the district court. This law, embraced, as it is, in appellant's bill, is thus made a part of her pleading and is in this manner thrust into the controversy without proof. The motion for an interlocutory injunction was based upon the bill. In the absence of contrary testimony and proof, the bill should stand as true, the truth of the facts alleged being assumed for the purpose of argument.

The invalidity of the law attacked, while alleged by complainant in her bill, is a matter of law rather than fact, notwithstanding that custom and conventionality of pleading require its invalidity to be asserted as a fact. A discussion of the validity of the terms of the Optometry Law, which is made a part of the pleading, the soundness of its text, and the propriety and constitutionality of its provisions, is appropriate.

BRIEF

PART ONE.

DENIAL OF THE INTERLOCUTORY INJUNCTION WAS THE ONLY ORDER APPROPRIATE AND JUSTIFIED UPON SHOWING MADE BY APPELLANT.

When complainant made her application for an injunction, she had no ground upon which to base her application other than her complaint, which, in the opinion of the writer of this brief, did not contain sufficently comprehensive allegations to furnish a showing justifying such intermediate relief.

A fundamental and underlying principle of equity relief is that an allegation of irreparable injury is essential to found a suit for temporary or permanent injunctive relief. As a general rule equity will not interfere by injunction unless the injury is irreparable.

Kirwin vs. *Murphy,* 189 U. S. 35;
Ritter vs. *Patch,* 12 Cal. 298;
Branch Turnpike Co. vs. *Board of Supervisors,* 13 Cal. 190;
Geurkink vs. *Petaluma,* 112 Cal. 306;
Meyers vs. *Ives,* 28 Colo. 461;
Johnson vs. *Baltimore, etc. R. Co.,* 4 App. Cas. D. C. 491;
State vs. *Wood,* 155 Mo. 425;
Campbell vs. *Seaman,* 63 N. Y. 568;
Western Union Tel. Co. vs. *Norman,* 77 Fed. 13.

A close and painstaking scrutiny of the complaint bill fails to disclose any allegation that complainant will be injured either greatly or irreparably. It is true that there is a vaguely comprehensive allegation in paragraph three of her complaint which includes the clause, "that she is dependent entirely upon the proceeds of her labor and services as a practicing ophthalmologist." This is not coupled with any allegation of injury, nor is there contained in the bill any assertion that plaintiff is not able to secure support from other sources or to follow any other vocation. Without an allegation of injury, it is an elementary principle that a pleader fails to bring his cause within the restricted sphere of equitable relief.

Mechanics' Foundry vs. *Ryall,* 75 Cal. 601;
Jacob vs. *Day,* 111 Cal. 571; 44 Pac. 243;
Atkins vs. *Chilson,* 7 Metc. (Mass.) 398;
Willcox vs. *Trenton Potteries Co.,* 64 N. J. Eq. 173.

Equity will not interfere where complainant's injury is merely theoretical and nominal.

Newby vs. *Highway Commissioners,* 21 Ill. App. 245;
People vs. *New York Canal Board,* 55 N. Y. 390.

TRUAX VS. RAICH, 239 U. S. 33.

The opinion in the above case is rich in precedent and is so broad in principle that we have examined its text with great care to learn in what way, if any, the case has widened the field of equity jurisdiction and thus has opened to aggrieved litigants a haven

theretofore closed to their appeals. We were strongly inclined to meet appellant's argument by disputing his right to go into equity to bar a criminal prosecution. We believe it elementary that he could not resort to such jurisdiction, if, by meeting what he deemed an invasion of his rights by redress at law, he was afforded an adequate remedy, that is, a remedy which, when complete, determined his claim and alleviated the ill which he had suffered, for "suits in equity shall not be sustained in any court of the United States in any case, where a plain, adequate and complete remedy may be had at law."

Section 267 of Judicial Code of United States.

In the case of *Truax* vs. *Raich,* there was under consideration a law enacted in the state of Arizona by initiative measure, making it a penal offense to employ less than 80 per cent qualified electors or native born citizens in any kind of work. The facts appeared to be that Raich, the appellee, was employed as a cook in the city of Bisbee. After the adoption of this measure by the people, he was notified by his employer that he would be discharged solely by reason of the requirements of this law. Hence the suit that resulted in the decision now under discussion. It will be noted that Raich, as an employee, was not subject to prosecution, but that the penal clause of the law was applicable to his employer, who, fearing the enforcement of the law, discharged the appellee from his employment.

In the opinion, it was said by Mr. Justice Hughes:

"It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors' (*In re Sawyer*, 124 U. S. 200, 210), a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property. *Davis & Farnum Mfg. Co.* vs. *Los Angeles*, 189 U. S. 207, 218; *Dobbins* vs. *Los Angeles*, 195 U. S. 223, 241; *Ex parte Young*, supra; *Philadelphia Co.* vs. *Stimson*, supra, p. 621. The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law."

Again the court said:

"It is further urged that the complainant can not sue save to redress his own grievance (*McCabe* vs. *Atchison, Topeka & Santa Fe Railway*, 235 U. S. 151, 162); that is, that the servant can not complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens and if enforced would compel the employer to discharge a sufficient number of his employees to bring the alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting the requirements of the act and avoiding threatened prosecution under its provisions.

> It is, therefore, idle to call the injury indirect or remote. It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had."

This opinion, then, settles for all time the right of a person who has no adequate remedy at law to enjoin the enforcement of an unconstitutional enactment of a state by resort to the federal tribunal. It still leaves the question as to what constitutes an adequate remedy at law in the obscurity which has surrounded the frequently repeated phrase since its principle was first enunciated. It was this court's opinion that the appellee in the case of *Truax* vs. *Raich* had no adequate remedy at law.

But does it follow that the same facts exist in the case at bar? We do not agree with the Honorable Court, which passed upon the merits of the interlocutory injunction in the case at bar, that the decision in *Truax* vs. *Raich* was sufficient precedent to determine its own jurisdiction. The appellant in the case at bar and the appellee, Raich, were not in the same or similar circumstances. Raich was discharged from employment; he was not in fear of criminal prosecution. It is true that his employer was in fear of a criminal prosecution, but there was not open to the employee, Raich, the opportunity of taking the case by writ of error to this court from a judgment of a local court of criminal jurisdiction.

Therefore, Raich had no adequate remedy at law. In the case at bar, the appellant, if arrested and convicted, might take her case to this court by writ of error. It is the recollection of the writer that such course has been uniformly pursued in the instances where the legislative measures of California and its political subdivisions have been under attack.

The rule is general that equity has no jurisdiction to enjoin a prosecution for a criminal offense in a court of law.

1 Joyce Injunctions, Sec. 58–60*a*.
In re Sawyer, 124 U. S. 200;
Fitts vs. *McGhee,* 172 U. S. 516;
Bosley vs. *McLaughlin,* 236 U. S. 385;
Arbuckle vs. *Blackburn,* 113 Fed. 616;
Davis and Farnum Mfg. Co. vs. *City of Los Angeles,* 189 U. S. 207;
Davis and Farnum Mfg. Co. vs. *City of Los Angeles,* 115 Fed. 537;
Logan & Bryan vs. *Postal Telegraph Co.,* 157 Fed. 570;
Brown vs. *Mayor, etc., of Birmingham,* 140 Ala. 590;
City of Denver vs. *Beede,* 25 Colo. 172; 54 Pac. 624;
Crighton vs. *Dahmer,* 70 Miss. 602;
Wallack vs. *Society,* 67 N. Y. 23.

This principle is explained in the case of *In re Sawyer,* 124 U. S. 200, in which case this court said:

"The modern decisions in England, by eminent equity judges, concur in holding that a court of

> chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. [Citing cases.]

In the case of *Davis and Farnum Mfg. Co.* vs. *City of Los Angeles,* 115 Fed. 537, Judge Wellborn, of the District Court, denied the jurisdiction of a court of equity to enjoin a criminal prosecution. This decision was affirmed in the United States Supreme Court. (See *Davis and Farnum Mfg. Co.* vs. *City of Los Angeles,* 189 U. S. 207.)

The case of *Dobbins* vs. *Los Angeles,* 195 U. S. 223, it is true, departed from the general rule, but an examination of the opinion in that case will make it apparent that this court considered the fact exceptional and the remedy necessary under the circumstances. It was a drastic remedy applied to a local but patently corrupted political situation. The following cases are instructive in this phase of equity intervention:

> *Sullivan* vs. *San Francisco Gas Co.,* 148 Cal. 371;
> *Brown* vs. *Mayor,* 140 Ala. 590;
> *Denver* vs. *Beede,* 25 Colo. 172.

While it is undoubtedly an axiom of law that the right to work and earn a living is a valuable right in the nature of property, yet the right to practice a profession is not a vested right, but is a license, revocable for cause, and within the power of a sovereignty to grant or withhold, subject only to the

requirement that it be extended to all upon an equal basis.

Dent vs. *West Virginia,* 129 U. S. 114;
Hawker vs. *New York,* 170 U. S. 189;
Watson vs. *Maryland,* 218 U. S. 173–179;
Collins vs. *Texas,* 223 U. S. 288;
State vs. *McIntosh,* 205 Mo. 616, 636.

Indeed, it was said in the case of *State* vs. *McIntosh, supra,* that no individual has a vested right to practice dentistry. In this connection, Mr. Justice Lamm said, "the theory that an individual has a vested right to practice dentistry is a rank heresy, finding no place in the philosophy of the law."

We have been reviewing such ground as appears to present a reasonable foundation for the order denying the appellant's application for an interlocutory injunction. In sequence of argument, we then come to the logical finale of all controversies bearing upon the grant or refusal of interlocutory orders, that is to say, an examination of the fact as to whether the order was within the sound discretion of the court of original jurisdiction. The granting or withholding of injunctive redress is always within the discretion of the tribunal addressed and should be exercised upon principles of equity and good conscience.

Coopey vs. *Keady,* 139 Pac. (Ore.) 108;
Martin vs. *Murphy,* 216 Mass. 466;
South, etc., R. Co. vs. *R. R. Commission,* 210 Fed. 465.

Indeed, it was said in *Magruder* vs. *Belle Fourche Valley Water Users Ass'n,* 133 U. S. C. C. A. Rep. 524–534, by Mr. Justice Sanborn, whose opinion in the Eighth Circuit, Court of Appeal, in this decision of December 8, 1914, constitutes a late and emphatic declaration upon the subject:

> "The granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction and when that court has not departed from the rules and principles of equity established for its guidance, its orders in this regard may not be reversed by the appellate court *without clear proof that it abused its discretion.* It is to the discretion of the trial court, not to that of the appellate court, that the law has intrusted the power to grant or dissolve such an injunction and the question here is: DOES THE PROOF CLEARLY ESTABLISH AN ABUSE OF THAT DISCRETION BY THE COURT BELOW?

To this principle is cited:

Am. Grain S. Co. vs. *Twin City S. Co.,* 202 Fed. 202.

In the last cited case, the same principle is enunciated and to it are cited the following cases:

Fireball G. T. & I. Co. vs. *Commercial Acetyline Co.* (C. C. A.) 198 Fed. 650, 653;

Massie vs. *Burck,* 128 Fed. 27, 31; 62 C. C. A. 535, 539;

Love vs. *A. T. & S. F. Ry. Co.,* 185 Fed. 321, 330; 107 C. C. A. 403;

High on Injunctions (4th Ed.) Sec. 1696.
Higginson vs. *C. B. & Q. R. R.*, 102 Fed. 197, 199; 42 C. C. A. 254, 6;
Interurban Ry., etc., vs. *Westinghouse E. & M. Co.*, 186 Fed. 166, 170; 108 C. C. A. 298, 302.

This court has declared that there can be no doubt that an appellate court will not interfere with a decision of the chancellor, refusing to grant an interlocutory injunction, unless it clearly appears that there has been an abuse of discretion.

L. & N. R. R. Co. vs. *United States*, 238 U. S. 1–9.

This principle, so well settled that the most disputatious counsel will not gainsay its permanency, must guide in this appeal, for it is an appeal from the order of the three judges in the district court, denying an interlocutory injunction, unless it is possible to show that the discretion of the learned judges was abused.

We maintain that such a showing is impossible in the face of a defective bill, containing no statement of great or irreparable damage, not indicating any property rights involved, and upon its face a mere artificial demand for a remedy which lies within the domain of law and not of equity.

The appellant's bill makes no showing as to her income derived from the practice of ophthalmology, or that complainant could not earn a livelihood otherwise, or that she could not subject herself to the same test of competency as others who desire to practice a system governed by the field of optometry. No

damage is shown other than that which the court must infer from the expression, "that she is dependent entirely upon the proceeds of her labor and services as a practicing ophthalmologist." The legal conclusion of complainant, stated in paragraph 13 of her complaint, that the suit is authorized by law under section 266 of the Judicial Code, does not of necessity decree a possibility or settle the fact. The right to a restraining process in any court must rest in principle upon an invasion of property rights, and the court of original jurisdiction had every reason to deny an interlocutory injunction upon considerations so unconvincing and inadequate. Complainant, if arrested, might take her case in orderly fashion by writ of error to this court from the decree of the court of last resort in California, affirming a judgment of conviction. Such is her legal remedy.

WHAT IS AN ABUSE OF DISCRETION?

The opinion of this court in the case of *L. & N. R. Co.* vs. *United States,* 238 U. S. 1, 9, is sufficient authority to support the postulate that the refusal of an interlocutory restraining order may be improper where the act sought to be restrained (in that case it was an order of the Interstate Commerce Commission, reducing a freight rate of a railroad company) operates to reduce revenue. In the case at bar no showing, similar in effect, is made. It probably follows that if the appellant's practice is interfered with, her revenue from it ceases, but it

does not follow that she loses her income unless it is established that other means of support are foreclosed to her and that she could not qualify, for arbitrary reasons, under the test of ability provided by the State Optometry Practice Act. The manifest distinction between the cases dispenses with the need of argument on this score. There is no very definite data covering instances illustrating an abuse of discretion. It seemed to be the sense of the court in a New York case that it would have been an abuse of discretion to grant an injunction in advance of the trial, where the owner of premises sought in equity to restrain a tenant from conducting a business of recording bets upon horse races in his premises, where there was no allegation in the complaint that the business was injurious to the plaintiff or to the premises demised, and where there was no allegation of damage. It was held that a demurrer to the complaint might be sustained and that the court should not be called upon to determine the legality or illegality of the business upon a mere motion.

DeLacy vs. *Adams,* 52 N. Y. St. Rep. 509.

Although the granting of an injunction is to a certain extent a matter of discretion with the court, yet, where no equitable case appears upon the record, it has been held to be an abuse of discretion to issue a restraining process.

Thompsonville Scale Mfg. Co. vs. *Osgood,* 26 Conn. 16.

If the case just cited states the correct doctrine, the only abuse of discretion which might have been charged to the court of original jurisdiction in the case at bar would have been the granting of an injunction upon the defective pleading of complainant. Contradistinguished from arbitrary discretion and from a lack of discretion, sound discretion consists of an observance of the rules and considerations which generally guide and influence courts in granting preliminary injunctions. In any given case such discretion is shown in the steady judgment with which the court applies the general rules to the particular fact with which it has to deal.

It was said in a well-known federal case that there are certain well settled rules regulating the granting of preliminary injunctions. They are that the complainant must show a clear, legal or equitable interest or right which is to be protected; that there must be a well grounded apprehension of immediate injury to those rights or interest, and a clear necessity must be shown of immediate protection to such interests or rights, which would otherwise be seriously injured or impaired. If it appear that the preliminary injuncton is not necessary to preserve the interests or property in *statue quo* until final hearing, and the rights of the complainant will suffer no serious injury until that time, or that the injury threatened is of such nature that it can be remedied on final hearing, then the injunction ought not to be granted, and so, if it

appear that the complainant's rights are not sufficiently clear and the consideration of the respective convenience or inconvenience to the parties, complainant and defendant, when balanced, show that serious injury may be done to the defendant by the granting of the injunction, and no serious injury will be done complainant by withholding it until final hearing, then the injunction ought not to be granted.

Rend vs. *Ventura Oil Co.*, 48 Fed. 248;
Finger vs. *Kingston*, 29 N. Y. St. Rp. 702.

It is said that the granting of an injunction is a judicial act; not only is it so, but it requires the exercise of the soundest judicial discretion, founded not upon arbitrary notions of justice or of right and wrong, but on a knowledge of the settled rules of equity.

Commercial Bank vs. *State*, 4 S. & M., Miss., 439;
Harriman vs. *Northern Securities Co.*, 132 Fed. 464.

Believing, then, that, in the case at bar, the application being made upon what we believe to be an incomplete pleading, with no particular showing of damage or great or irreparable injury, and with no showing that an adequate remedy at law did not exist in the premises, excepting the mere conclusion, the court exercised the soundest discretion and permitted no error of judgment in its order denying appellant's motion for an interlocutory injunction, we submit that the order should be affirmed.

PART TWO.

THE OPTOMETRY PRACTICE ACT SHOULD BE SUSTAINED AS A VALID MEASURE.

This act is known as an act to regulate the practice of optometry, which is defined by section two thereof to be "the employment of any means other than the use of drugs for the measurement of the powers or range of human vision or the determination of the accommodative and refractive states of the human eye, or the scope of its functions in general or the adaptation of lenses or frames for the aid thereof." It is proper for the states to enact measures for the general welfare of their people and to place restrictions upon the practice of professions which will secure their people against the consequences of ignorance and incapacity.

Dent vs. *West Virginia,* 129 U. S. 114.

The practice of optometry has been very ably explained in the case of *Martin* vs. *Baldy,* 249 Pa. St. 253. It was there said to be the profession of examining the eyes of patients to ascertain the range of vision, visual powers in general, the extent of the visual field, the refractive state or condition of the eye, and the possible movement of the eyeball. The court continuing in its opinion said:

> "It is well established that optometrists do not use medicines in the performance of their work, nor do they resort to anything in the nature of surgical treatment."

Further:

> "It appears from the proofs that the business or profession of optometry is one of ancient standing. Until a comparatively recent date a large part of that which is done by optometrists was exclusively within their province and was not covered in practice by the efforts of the physician or surgeon. Within the last quarter of a century, or thereabouts, it appears from the proofs that, among those who are engaged in the making of lenses to correct or cure defects in eyes, there has arisen a classification or division, whereby some who make lenses confine themselves entirely to the work of making them in accordance with prescriptions given by physicians or oculists. These call themselves or are known as 'opticians'; others, who still manufacture the lenses, either according to their judgment or the prescription of physicians, do not confine themselves to the making of lenses, but also examine the eyes for the purpose of ascertaining whether there are such defects visible as can be corrected by the application of lenses. This class have taken the name of 'optometrists,' and that is the name by which they are now generally known."

The court distinguished the practice of optometry from the practice of medicine, and in language which follows explained the distinction between these professions:

> "Can it be said that men who are engaged in a business of recognized and ancient standing such as optometrists, would have been likely, upon being made aware that a bill was pending in the

legislature, having such a title as that which has been cited and quoted, to regard it as having any possible application to themselves? If not, then, they would have been deprived of the opportunity to protest or make suggestions, which, as we understand the case, the constitutional requirement as to the nature of a title of a statute was intended to provide.

"These men are not practicing medicine in a popular sense of the term. They give and prescribe no medicines. Nobody pretends that they ever resort to surgery. Why, then, supposing one or more of these optometrists had been informed of the pendency of such a bill in the legislature would he reasonably or naturally have regarded the bill as intended to affect people engaged in the same business that he was conducting?"

Again:

"A good deal has been made in the case, of the prohibition in the first section of the act of 1911, applicable to persons who 'diagnose diseases.' It has been claimed that the plaintiffs and other optometrists do diagnose diseases. The proofs in the case are to the effect that optometrists, examining the eye of a patient, either with or without the aid of artificial means, in case they find that the interior of the eye is clouded and gives ground for suspicion that there is some disease of the eye, inform the patient that for his own protection and safety, he should consult a physician. We understand that under such circumstances the optometrists decline to furnish lenses for the patient."

It is sufficient, in the language of the learned judge, just quoted, to indicate in general the reasons which may have dictated the legislative body to license the practice of optometry.

That the profession of adjusting lenses to the human eye is one which requires skill, practice and study, no person will have the temerity to deny. As was said by the learned judge, just quoted, if the optometrist finds in the interior of the eye any condition that supports a suspicion of disease, he directs his patient to a physician, who, by virtue of his more extended training, may treat the condition medically or surgically, as his professional judgment dictates. It appears logical that an optometrist should be examined and licensed upon a basis of merit and learning, not only that he may properly adjust the lens to the eye, but that he may recognize abnormal organic conditions when his investigation of the eye of his customer brings them to his light.

This question can not be lightly treated. Our adversary's expression that the use of the trial frame and test card is a practice in itself absolutely inoffensive and harmless is a self-negativing platitude. The practice of ophthalmology, if it be the same as the practice of optometry—and it must be co-extensive or appellant's case falls—is a practice which can only be pursued after a complete training. (See appellant's brief, page 12.) The practice of optometry includes an examination of the eye and a diagnosis for refractive error. That a trial frame and test card may be used in this practice does not minimize the

responsibility of the practitioner. It requires no experience or learning to determine that harm may befall the patient of an unskilled optometrist, for is not he dealing with the most sensitive and delicate organ of the human body. (See appellant's brief, page 17.)

We believe that it sufficiently follows that the practice should be licensed and in the following cases it has received legal recognition in some form:

Tipton vs. *State,* 74 Tex. Crim. Rep. 225; 168 S. W. 97;
State vs. *Yegg,* 19 S. D. 234.

For decisions of general application to the regulation of professional activities, see

Dent vs. *West Virginia,* 129 U. S. 114;
Hawker vs. *New York,* 170 U. S. 189;
Reetz vs. *Michigan,* 188 U. S. 505;
Watson vs. *Maryland,* 218 U. S. 173;
Collins vs. *Texas,* 223 U. S. 288.
People vs. *Jordan,* Cal. Supreme Court, Mch. 24, 1916;
People vs. *Ratledge,* Cal. Supreme Court, Mch. 24, 1916;
People vs. *Hornef,* 154 Cal. 355;
Ex parte McManus, 151 Cal. 331;
Hewitt vs. *Board,* 148 Cal. 590;
Ex parte Whitley, 144 Cal. 167;
Ex parte Gerino, 143 Cal. 412;
Eastman vs. *State,* 109 Ind. 278; 58 Am. Rep. 400;
State vs. *Dent,* 25 W. Va. 1;
Ex parte Frazer, 54 Cal. 94;
Harding vs. *People,* 10 Colo. 387, 15 Pac. 727;

Williams vs. *People*, 121 Ill. 84, 11 N. E. 881;
People vs. *Blue Mountain Joe*, 129 Ill. 370, 21 N. E. 923;
State vs. *Mosher*, 78 Ia. 321, 43 N. W. 202;
Iowa Eclectic Medical College vs. *Schrader*, 87 Ia. 659, 55 N. W. 24, 20 L. R. A. 355;
Driscoll vs. *Commonwealth*, 93 Ky. 393, 20 S. W. 431;
Hewitt vs. *Charier*, 16 Pick. 353;
People vs. *Phippin*, 70 Mich. 6, 37 N. W. 888;
State vs. *State Medical Examining Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238;
State vs. *State Board of Medical Examiners*, 34 Minn. 387, 26 N. W. 125;
State vs. *Fleischer*, 41 Minn. 69, 42 N. W. 696;
Craig vs. *Board of Medical Examiners*, 12 Mont. 203, 29 Pac. 532;
State vs. *District Court*, 13 Mont. 370, 34 Pac. 609;
Dogge vs. *State*, 17 Neb. 140, 22 N. W. 348;
C. Gee Wo vs. *State*, 36 Neb. 241, 54 N. W. 513;
Ex parte Spinney, 10 Nev. 323;
In re Roe Chung (N. M.), 49 Pac. 952;
In re Smith 10 Wend. (N. Y.) 449;
People vs. *Fulda*, 52 Hun. 65, 4 N. Y. Supp. 945;
State vs. *Van Doran*, 109 N. C. 864, 14 S. E. 32;
State vs. *Call*, 121 N. C. 643; 28 S. E. 517;
France vs. *State*, 57 Ohio St. 1; 47 N. E. 1041;
Barmore vs. *State Board Medical Examiners*, 21 Or. 301; 28 Pac. 8;
State vs. *Randolph*, 23 Or. 74; 31 Pac. 201; 37 Am. St. 655;
Logan vs. *State*, 5 Tex. App. 306;
People vs. *Hasbrouck*, 11 Utah 291;

For vs. *Territory*, 2 Wash. T. 297;
State vs. *Carey*, 4 Wash. 424; 30 Pac. 729.

And more recent cases are:
People vs. *Griswold*, 213 N. Y. 92;
Kettles vs. *People*, 221 Ill. 221.

We note the language of this court in a case originating in the New York jurisdiction:

> "No precise limits have been placed upon the police power of a state, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. These propositions have been often affirmed. In *Dent* vs. *West Virginia*, 129 U. S. 114, 122, it was said in respect to the qualifications of a physician: 'The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud.' "
>
> *Hawker* vs. *New York*, 170 U. S. 192–94.

THE TERMS OF THE OPTOMETRY ACT ARE NOT UNCONSTITUTIONAL AND THEIR VALIDITY IS AMPLY SUPPORTED BY PRECEDENT.

For the purpose of facilitating the discussion of this phase of the controversy, we desire to enumerate what we believe to be the points made by appellant in her bill of complaint, touching the unconstitutionality of the law.

1. That because plaintiff practices what she terms ophthalmology, which, according to her contention, is comprehended in the definition of the practice of optometry, she is discriminated against.

2. That the law is unconstitutional because it appropriates to the sole use of registered optometrists the right to employ means, other than the use of drugs, to measure the range of human vision.

3. That it tends to create a monopoly, in that physicians and surgeons are relieved from the operation of the law.

Analyzing appellant's various contentions, they are narrowed down to the one question whether the practice of measuring the range of human vision by lenses and frames or other drugless means should be regulated. Counsel for appellant takes the position that because appellant calls her practice that of ophthalmology, although admitting that it covers the same field as optometry, she is discriminated against by the optometry law, because she is required to take an examination. This contention is the height of

absurdity. Let us lay aside the terms "ophthalmology" and "optometry" and say that any person who measures the range of the human vision and adjusts lenses to the eye to correct defects in vision, without the use of drugs, shall be required to submit himself to an examination by persons who are familiar with that practice. If ophthalmology is the practice, as set up in the bill of complaint of appellant, of fitting glasses to the human eye and treating inflammation of the eye, and she does not use drugs in such practice, then she is practicing what the law defines to be "optometry," and without reference to what she calls the practice, it remains that she is performing services in a vocation which requires study and training, and which is a licensed vocation, and that she seeks by calling it another name to escape the tests which are imposed upon all other persons under like conditions in such practice. All persons, without reference to their sex or quality, are permitted to become registered optometrists under the law upon equal terms and under equal restrictions. No single individual or class is the recipient of any favors, excepting a physician or surgeon, which exception we will discuss later in this brief. Therefore, if appellant desires to practice ophthalmology, as she terms it, or optometry, as it is termed in the law under consideration, or the practice of measuring the range of human vision, all of which terms convey the same import, she must engage to fulfill the same requirements, and no more, than other persons under the

same circumstances must fulfill. Because she is a "regularly graduated ophthalmologist," is no reason why she should be permitted to practice that profession without examination when others are not.

The case of *Collins* vs. *Texas,* 223 U. S. 288, is enlightening upon this subject. In that case the plaintiff in error had secured a writ of error directed to the court of last resort in Texas. He was what is known as an "osteopath." He treated a patient for hay-fever and was arrested. He sought the remedy of a writ of habeas corpus in Texas, and this was denied him. In this court his contention was that he was a graduate of the American School of Osteopathy, at Kirksville, Missouri, and that he was not practicing medicine under the Texas statute, inasmuch as osteopathy did not embrace the use of medicines. The provision of the Texas statute under discussion contained the following:

> "Any person shall be regarded as practising medicine within the meaning of this Act * * * (2) or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method, or to effect cures thereof, and charge therefor, directly or indirectly, money or other compensation."

Thus, it will be seen that the Texas statute defined the practice of medicine to consist of any system of treating disorders, whether medicines were used or were not used. Plaintiff in error contended that the

definition was arbitrary and irrational, but this court said:

> "But it would be immaterial if it were, as its only object is to explain who falls within the purview of the act. That it does, and of course we follow the Texas court in its decision that the plaintiff in error is included. It is true that he does not administer drugs, but he practices what at least purports to be the healing art."

In the case at bar, appellant contends that because she practices ophthalmology, which, according to her definition, is the same thing as the practice of optometry, she is discriminated against because she calls the practice by another name than that used in the law. This, it would seem, is the same argument used by plaintiff in error in *Collins* vs. *Texas, supra.*

Again this court said:

> "We should presume, until the Texas courts say otherwise, that the reference in section 4 to the diploma of a reputable and legal college of medicine, and the confining in section 7 of examinations to graduates of reputable medical schools, use the words medicine and medical with the same broad sense as section 13, and that the diploma of the plaintiff in error would not be rejected merely because it came from a school of osteopathy. In short, the statute says that if you want to do what it calls practicing medicine you must have gone to a reputable school in that kind of practice. Whatever may be the osteopathic dislike of medicines, neither the school nor the plaintiff in error suffers a constitutional wrong if his place of tuition is called a medical school

by the act for the purpose of showing that it satisfies the statutory requirements. He cannot say that it would not have been regarded as doing so, because he has not tried. *Dent* vs. *West Virginia,* 129 U. S. 114, 124."

And the reasoning which follows by this court in the same case is equally applicable to the case at bar. It was said on page 296 in the case cited:

"An osteopath professes, the plaintiff in error professes, as we understand it, to help certain ailments by scientific manipulation affecting the nerve centers. It is intelligible therefore that the state should require of him a scientific training. *Dent* vs. *West Virginia,* 129 U. S. 114; *Watson* vs. *Maryland,* 218 U. S. 173. He like others must begin by a diagnosis. It is no answer to say that in many instances the diagnosis is easy—that a man knows it when he has a cold or a toothache. For a general practice science is needed. An osteopath undertakes to be something more than a nurse or a masseur, and the difference rests precisely in a claim to greater science, which the state requires him to prove."

This, we believe, should dispose of this part of appellant's contention.

The next question raised is that the law appropriates to the use of registered optometrists the sole right to measure the range of human vision without drugs. This question harks back to the main and fundamental policy governing all legislation of this character. Is the law invalid because it creates by its terms a special field in which only certain persons,

who have proved their ability, may exercise their vocation? In other words, is it proper for the state to regulate the practice of optometry by excluding from such practice all persons who have not demonstrated their fitness to practice by examination or other appropriate test? If we put this query in other language, we would say, is the law unconstitutional which prohibits the practice of a vocation without a test of competency? Is it necessary to cover this entire subject matter again? It seems that it should not be necessary. This court in the cases which we have heretofore cited has consistently upheld the right of a state to exact certain qualifications from individuals before they engage in vocations which require study and skill.

This court said in a Michigan case that the power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine, and punishing those who attempt to engage therein in defiance of such statutory provisions, is not open to question.

Reetz vs. *Michigan*, 188 U. S. 505.

And in the case of *Ex parte Whitley*, 144 Cal. 167, the Supreme Court of California said with reference to the Dental Practice Act of that state:

> "The law, no doubt, is discriminatory, but not in any constitutional sense. It does not discriminate between classes. The discrimination goes to the degree of learning and skill which all applicants for examination must possess. It discriminates between those who have the necessary degree

of learning and skill, and those who have not; between those who are able and those who are unable to acquire it. It is not an unreasonable or capricious discrimination applying to classes as such, or members of a class, but is based solely upon professional qualifications. It is a discrimination which, in the interest of the public welfare, it is the duty of the legislature to make, and the necessity for which, and its nature and extent—whether an examination and right to practice shall depend on the possession by the applicant of a diploma of a dental college only, or be extended to others, and how far—depend primarily upon the judgment of the legislature, which, when reasonably exercised, the courts cannot control."

In the case of *State ex rel. Burroughs* vs. *Webster et al.,* 150 Ind. 607, the court said that statutes denying to all physicians in the state the right to continue their practice without examination, and restricting the practice of medicine to persons who were able to demonstrate their qualifications have been held constitutional as a proper exercise of the police power of the state. This principle was carefully written and is supported by many authorities, as more particularly set forth upon another page.

THE EXEMPTION OF PHYSICIANS AND SURGEONS.

Section 10 of the Optometry Practice Act provides that the law shall not be so construed as to prevent duly licensed physicians and surgeons from treating the human eye. This, counsel says, amounts to discrimination which is invidious and detrimental to

the just interests of his client. He argues that it is not within the power of the legislature to enact a special law under the guise of a police regulation, granting immunity to the practitioner who employs drugs in determining the state of the human eye and imposing restrictions upon those who do not employ drugs.

Counsel states that the law permits the practitioner who uses drugs in his profession to work irreparable injury to the eye without regulation, whereas, those who do not use drugs are obliged to submit to an examination. Of course, this argument is fallacious in that it does not express the full premises. We can conceive that if the practice of those who use drugs in treating the human eye, were not regulated, such discrimination might be improper. However, it is a well-known fact that in all states today there is some regulation of the practice of medicine. In the state of California that regulation is expressed in what is known as the Medical Practice Act, the validity of which act is now being tested before this same tribunal in the case of *P. L. Crane* vs. *Johnson et al.* (October Term, 1916, No. 1031).

The Medical Practice Act referred to contains a prohibition directed to the practice by those who have not qualified under the terms of that act. Therefore, the exception in favor of physicians and surgeons in the Optometry Practice Act is proper under the circumstances.

The exception in favor of the users of drugs is contained in that provision which defines what shall constitute the practice of optometry. It is merely a part of the definition of the practice of optometry, included to make plain that such practice was what the writer of this brief terms the mathematical and mechanical determination of defective vision as opposed to the symptomatical determination by diagnosis.

The section which exempts physicians and surgeons contains the phrase, "duly licensed," modifying the term "physicians and surgeons," so that it is apparent the Optometry Act clearly contemplates that the physician and surgeon, who is exempted from the operation of the law, shall be qualified to examine the eye by virtue of some other specialized training, such as the training which the physician and surgeon must acquire to become duly licensed as such. Such discriminations in the law are always recognized as proper and are not discriminations in the constitutional sense.

Physicians and surgeons are equipped by knowledge, education and experience to do optometry work, and, therefore, should be made exempt from the provisions of the law, which law is intended, like other regulatory measures, to prevent injury to those persons who put trust in the skill of the optometrist whom they consult for the purpose of improving their vision.

Physicians and surgeons, having the same knowledge, or having an education which is intended to give them a knowledge of the structure of the eye,

are in a position to do optometry work, and should, therefore, be exempt from the provisions of the law. Keeping in mind that physicians and surgeons are regulated by a law which is considered reasonably stringent and that they are required to pass an examination more difficult, involved and comprehensive in character, and to include within their educational curriculum much more advanced and technical studies than an optometrist, it is, therefore, clear why this distinction is made.

Discrimination is proper where there is such a distinction in the character of the conditions between which the discrimination is made as to rationally justify a different and unequal application of the law.

In the case of *Watson* vs. *Maryland, supra,* this court considered a provision of the Maryland Medical Practice Act, which granted immunity to those who furnished gratuitous services and to certain others, etc. This court sustained such exception as valid and proper under the circumstances, and in so doing said:

> "The stress of the argument for the plaintiff in error as to these exceptions is put upon the exemption of resident physicians, or assistant physicians, at hospitals, and students on hospital and dispensary duties. The selection of the exempted classes was within the legislative power, subject only to the restriction that it be not arbitrary or oppressive and apply equally to all persons similarly situated. We can not say that these exceptions nullify the law. The reason for them may be that hospitals are very often the subject of state or municipal regulation and control, and

employment in them may be by boards responsible to public authority under state law or municipal ordinance. Certainly the conduct of such institutions may be regulated by such laws or municipal regulations as might not reach the general practitioner of medicine. In any event, we can not say that these exceptions are so wholly arbitrary and have such slight relation to the objects to be attained by the law as to require the courts to strike them down as a denial of the equal protection of the law within the meaning of the federal constitution."

In the case of *People* vs. *Jordan*, 51 Cal. Decisions, 435 (not yet published in official reports), decided March 24, 1916, by the Supreme Court of California, that court considered the same form of argument directed against the Medical Practice Law because of its exemption in favor of what are known as Divine Healers, or those who heal by prayer, but in rendering that decision the court said:

"Coming to the exempted class of drugless healers, namely, those who treat by means of prayer, here, too, there exists an obvious ground for classification. The treatment practiced by many, though not all, of the drugless practitioners, is by manipulation of the bones and the kneading of the muscles and tissues of the person treated. It is apparent that without the proper knowledge of the human body, its organs and functions thereof, or lack of skill, grave consequences to the patient might follow as a result of their treatment; not so, however, as to one who in prayer

invokes Divine power to afford relief to one afflicted by disease. The possession of the prescribed knowledge and skill, without which the chiropractor, osteopath and neuropath is denied the right to practice his treatment, in no wise renders the prayer of one thus treating bodily ills more efficacious in the curing of disease. * * * To our mind it is obvious that no reason exists for requiring the class engaged in the treatment by prayer to possess the knowledge and skill required of others engaged in drugless treatment. The ground for classification is as obvious as the distinction between a physician and surgeon on the one hand, and a drugless practitioner on the other, and as to each of which classes a different rule applies. That the legislature has the right to establish such classification and exempt one class from the operation of a general law, where the same is founded upon some natural, intrinsic or constitutional distinction, is too well settled to require citation of authorities therefor; indeed, its constitutional right so to do is conceded by appellant."

The Illinois Supreme Court, passing upon the propriety of granting immunity to physicians and surgeons, dismissed the subject as one too obviously indisputable to need extended comment.

Kettles vs. *People,* 221 Ill. 221, 232.

The Court in the above case expressed:

"Section 5 of the Dental Act of 1905 prescribes what persons shall be regarded as practicing dentistry, which is followed by proviso: 'Provided, that nothing in this act shall be so con-

strued as to prevent regularly licensed physicians or surgeons from extracting teeth. Further, this act shall not prevent students from performing dental operations under the supervision of competent instructors within a dental school, college or dental department of a university recognized as reputable by the Illinois State Board of Dental Examiners.' It is insisted that this is class legislation, prohibited by said section 22 of article 4 of the constitution, in that it purports to give physicians and surgeons the right to practice dentistry without a license. The clear reading of the statute is that it shall not be 'so construed as to prevent regularly licensed physicians and surgeons from extracting teeth.' The reason for the exception is obvious, and that it is not class legislation is too clear to require serious consideration."

A recent case before this court in which one of the controversies involved the right of the legislature of California to except from the operation of a statute regulating the hours of labor of certain classes of female workers, including nurses, those nurses known as graduate nurses, illustrates the legislative right to draw a distinction in the law between classes of persons standing in different relation to the condition sought to be remedied by the law.

Bosley vs. *McLaughlin et al.*, 236 U. S. 385.

It was said:

"And, in the appellants' offer of proof, it is said that 'graduate nurses working in and employed by hospitals do not ordinarily perform therein the work of nursing the sick, but act as

> overseers to assistants to the medical staff.' It may be, as asserted, that the difference in qualifications between a graduate nurse and an 'experienced nurse' is a difference of technical education only, but that difference exists and is not to be brushed aside. It is one of which the legislature could take cognizance."

We believe it should require no more extended citation of authority to bring to view the extensive foundation upon which rests the legislative discretion in founding statutory distinctions. The discrimination in favor of the users of drugs is proper because custom has developed the practice of optometry to exclude the use of drugs, and because the use of drugs constitutes the practice of medicine. The discrimination in favor of licensed physicians and surgeons is justified because such profession is founded on a training intrinsically inclusive of the knowledge and skill necessary for the examination and repair of the human eye.

We take the liberty of adding the words of this court employed in a discussion of this vital, constitutional question in the late case of *Rast* vs. *Van Deman and Lewis,* 240 U. S. 342, 57.

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it and the existence of that state of facts at the time the law was enacted must be assured. (*Lindsley* vs. *National Carbonic Gas Co.*, 220 U. S. 61, 78.) It makes no difference that the facts may be disputed

or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. (*C. B. & Q. R. R.* vs. *McGuire*, 219 U. S. 549, etc.) * * * And, we repeat, 'It makes discriminations if founded on distinctions that we can not pronounce unreasonable and purely arbitrary.' "

It is strongly urged by appellees that the Optometry Practice Act of California is valid and not in conflict with constitutional restrictions.

Respectfully submitted.

U. S. WEBB,
Attorney General of the State of California,
ROBERT M. CLARKE,
Deputy Attorney General of the State of California,
THOMAS LEE WOOLWINE,
District Attorney of the County of Los Angeles,
GEORGE E. CRYER,
Deputy District Attorney of the County of Los Angeles,
RAY E. NIMMO,
Of Counsel,

Attorneys for Appellees.